Supreme Court, U.S.
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In The

Supreme Court of the United States

ALBINGIA VERSICHERUNGS A.G. AND SIEMENS COMPONENTS PTE. LTD.,

Petitioners,

v.

SCHENKER INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case removed from state court under 28 U.S.C. §§ 1441(b) and 1331, may the district court exercise supplemental jurisdiction over the state-law claims after it finds, on a motion for summary adjudication, that the federal treaty on which removal jurisdiction was based does not apply, such that there was no federal subject-matter jurisdiction either when the case was removed or when the final judgment was entered?

2. May the district court decide state-law claims, retained under its supplemental jurisdiction, by applying a federal rule of decision rather than the substantive state law under which the claims arose?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Albingia Versicherungs A.G. is a private company, and 100% if its stock is owned by AXA Colonia Konzern A.G. of Köln, Germany. AXA Colonia is a public company; approximately 75% of its stock is owned by AXA S.A. of Paris, France, and approximately 25% is owned by institutional and private shareholders.

Petitioner Siemens Components Pte. Ltd. is a private company, and 100% of its stock is owned by Siemens A.G. of München, Germany, a public company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Albingia Versicherungs A.G. and Siemens Components Pte. Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The court of appeals' amended opinion (Pet. App. 1-16) is reported at 350 F.3d 916. The original opinion was reported at 344 F.3d 931.

STATEMENT OF JURISDICTION

The court of appeals entered its original opinion and order on September 15, 2003. Petitioners filed a timely petition for rehearing en banc on September 26, 2003. On December 3, 2003, the court of appeals entered an Order Amending Opinion and Denying Petition for Rehearing En Banc and Amended Opinion. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

U.S. CONST. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting

Ambassadors, other public Ministers and Consuls; – to all cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

. . .

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

. . .

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or the residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may

be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

. . .

28 U.S.C. § 1447. Procedure after removal generally

. . .

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

Fed. R. Civ. P. 12(h). Waiver or Preservation of Certain Defenses

. . .

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Fed. R. Civ. P. 41. Dismissal of Actions

. . .

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for

failure to join a party under Rule 19, operates as an adjudication upon the merits.

. . .

Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. 876 (1934) ("Warsaw Convention")

. . .

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in the charge of the carrier, whether in an airport or on board an aircraft, or in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

. . .

STATEMENT OF THE CASE

1. This case presents a claim for the loss of one-third of a shipment of computer chips, pilfered by respondent's employees while in storage at respondent's warehouse in South San Francisco, California. The issues presented are whether the district court had subject-matter jurisdiction to enter final judgment and whether it improperly decided petitioners' state-law claims by applying federal common law rather than the state law under which the claims arose.

2. Petitioner Albingia Versicherungs A.G. ("Albingia") insured petitioner Siemens Components Pte. Ltd. ("Siemens") for the risk of loss or damage to its goods. Siemens shipped a quantity of integrated computer circuits from its factory in Singapore to Mosel Vitelic, an independent testing company in San Jose, California. Siemens hired Mosel Vitelic to test the circuits and certify them for use. After testing and certifying the circuits, Mosel Vitelic packaged them in boxes, and packed three boxes in each of thirty-five cartons for return shipment to Siemens. Siemens hired respondent, an international air freight forwarder, to arrange for transportation of the goods by air to Siemens' factory in Singapore.

3. Respondent hired a trucker to bring the goods from Mosel Vitelic to respondent's warehouse in South San Francisco. Respondent received the thirty-five cartons of computer chips at its warehouse on February 24, 1997. According to its storage records, respondent stored the goods in its warehouse over a period of five calendar days, from February 24 through February 28, 1997. The district court ultimately determined that the loss took place in respondent's warehouse, at the hands of respondent's

personnel, prior to the transportation by air from San Francisco to Singapore. On February 28, at 11:36 P.M., respondent departed from its warehouse with the thirty-five cartons to deliver them to Eva Airways Corp. ("Eva"), the actual air carrier with whom respondent had arranged transportation of the goods to Siemens. Eva received the shipment on March 1, 1997, thereafter carried it to Taiwan, transferred it to a plane bound for Singapore, and delivered the cartons to respondent's subsidiary in Singapore on March 4, 1997. It was respondent's subsidiary that first noted the cartons had been tampered with. Respondent's subsidiary notified Siemens, and representatives of both inspected the cartons, finding that all thirty-five contained two, not three, boxes of computer chips and, in place of the third box, a brick ultimately found to be the make of a brickyard in San Jose.

4. When petitioners filed suit in the California Superior Court, they had no knowledge of when, where, or by whom the computer chips had been pilfered and replaced by bricks. If it developed, through discovery, that the theft had taken place in a California warehouse – either respondent's or Eva's – petitioners claims would sound in tort and contract under California law. On the other hand, if it emerged that the theft had taken place during the period of transportation by air, as defined by Article 18 of the Warsaw Convention – which applies as a bilateral treaty to air transportation between the United States and Singapore – petitioners' exclusive remedy would be a claim under the Warsaw Convention. Because, at the time suit was filed, only the defendant responsible for the theft knew its culpability, petitioners were forced to join a claim against respondent and Eva under the Warsaw Convention with their state-law claims against them, in order to avoid the Warsaw time bar in the event

discovery disclosed that the loss had happened during international transportation by air. The unavoidable joinder of the Warsaw claim with petitioners' state-law claims gave Eva the opportunity to remove the case from the California court to the United States District Court for the Northern District of California.

5. On taking respondent's deposition under Fed. R. Civ. P. 30(b)(6), petitioners learned that respondent's warehouse was equipped with surveillance cameras, including one or more that were trained on the spot where the thirty-five cartons were held during the course of five calendar days. Respondent admitted that after its subsidiary in Singapore notified it of the pilferage it had discovered, respondent's senior management in South San Francisco – Branch Manager Joachim Kueppers and Warehouse Manager Jim Mollison – reviewed the videotapes made by the surveillance cameras during the five-day interval when the goods were in the warehouse. Respondent, however, failed to produce these videotapes, claiming they could not be found and admitting it could not account for their disappearance.

6. While the parties were mediating, respondent filed a motion for summary adjudication, seeking to limit its liability for the pilferage to $20 per kilogram of goods lost or damaged – the amount specified in the house air waybill it issued for the transportation from San Francisco to Singapore. In its reply memorandum supporting its motion, respondent admitted the goods had been pilfered in its warehouse: "If seen in a light most favorable to Siemens and Albingia, the videotapes would show Mr. Kueppers taking the circuit boards out of the boxes and

Mr. Mollison inserting the bricks."[1] Even so, respondent asserted, it was not vicariously liable for these acts by its upper management and was, accordingly, entitled to limit its liability.

7. In deciding the motion, the district court wrote that it "must be presumed that the loss occurred while the cargo was stored in Schenker's South San Francisco warehouse. Consequently, the Warsaw Convention does not apply and Schenker concedes this." (Pet. App. 35)[2]

8. Based on the court's determination that the Warsaw Convention does not apply to the loss, petitioners filed a suggestion of lack of subject matter jurisdiction under Fed. R. Civ. P. 12(h)(3). Noting that the Warsaw Convention had been the only basis of original jurisdiction for removal of the case, petitioners suggested that the fact that the Convention did not apply deprived the court of the original jurisdiction necessary to sustain supplemental jurisdiction of their state-law claims under 28 U.S.C. § 1367. The district court reacted by scolding petitioners for not filing their suggestion prior to the court's decision of respondent's motion – i.e., prior to the court's determination that the Warsaw Convention does not apply. Asserting that the Warsaw claim appeared on the face of the complaint at the time of removal, the court reasoned that it had original jurisdiction under the treaty when it

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[1] Schenker's Reply Memorandum at 5/26-28 (District Court Docket No. 47 at 5/26-28).

[2] The court went on to find that respondent could limit its liability by contract, ignoring respondent's admission that the court could conclude, because of the disappearance of the video evidence, that senior management had effected the theft.

exercised supplemental jurisdiction over petitioners' state-law claims, such that supplemental jurisdiction survived the determination that Warsaw does not apply. (Pet. App. 24-28) Petitioners followed with a motion to dismiss for lack of subject-matter jurisdiction, and the court denied the motion. (Pet. App. 20-23)

9. Although the court asserted its jurisdiction to decide the remaining state-law claims, it resolved those claims by applying federal common law rather than the substantive law of the state. On the basis of federal law, the court entered final judgment in petitioners' favor in the amount of the limitation sought by respondent (Pet. App. 17-19), and petitioners appealed.

10. On appeal, petitioners argued that the only basis of subject-matter jurisdiction, the Warsaw Convention, had been held inapplicable, thereby eliminating the only basis for both the removal and the district court's exercise of supplemental jurisdiction. The appeal also challenged the district court's authority to enter final judgment when it lacked subject-matter jurisdiction at the time of judgment. Finally, the appeal asserted that the court had erred by deciding petitioners' California state-law claims by applying federal common law, and that the difference matters because California and federal law have conflicting rules for imputing vicarious liability to a corporation such as respondent.

11. The court of appeals affirmed on the theory that the district court, in determining that the Warsaw Convention did not apply, had decided petitioners' Warsaw claim *on the merits*. (Pet. App. 8) By this device, the court of appeals distinguished the cases in other circuits which make clear that the district court cannot exert

supplemental jurisdiction over state-law claims after dismissing the only federal claim or claims *for lack of subject-matter jurisdiction*. The court of appeals tried to bring this case within the ambit of cases holding that the dismissal of the only federal claim or claims *on the merits* does not deprive the court of supplemental jurisdiction over remaining state-law claims. (Pet. App. 10)

12. On the choice-of-law issue, the court of appeals affirmed the district court's application of federal common law to determine the extent of respondent's liability for the theft of goods in its California warehouse prior to the applicability of the Warsaw Convention and during the applicability of California law. The court summarized Ninth Circuit law as establishing that California law governs the vicarious-liability issue if the loss is subject to the Warsaw Convention, but federal common law controls if the loss occurs when only state law, and not the federal treaty, applies. Conceding that this "may seem nonintuitive," the court of appeals explained it was required by Ninth Circuit authority to affirm the application of federal common law to decide petitioners' state-law claims. (Pet. App. 16)

13. Petitioners filed a petition for rehearing en banc, asking the Ninth Circuit to review the panel's rulings on the supplemental-jurisdiction issue and on the application of federal common law. The petition also pointed out a number of factual errors in the opinion. The panel responded by issuing an order amending the opinion to correct some of those factual errors, but left intact its holdings on supplemental jurisdiction and choice of law. The order also denied the petition for rehearing.

14. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The writ should be granted for a number of reasons. *First*, the court of appeals has held that, in a case removed under 28 U.S.C. §§ 1441(b) and 1331, the district court may exert supplemental jurisdiction over state-law claims after dismissing the only section 1331 claim for lack of subject-matter jurisdiction. This conflicts with decisions of the Federal, District of Columbia, Second, and Sixth Circuits, and with the language of 28 U.S.C. § 1367. *Second*, the court of appeals has held that the district court's determination that the Warsaw Convention did not apply constituted a dismissal of petitioners' Warsaw claim on the merits, rather than a finding of no subject-matter jurisdiction under that federal treaty. The decision below confounds the distinction between a dismissal for lack of jurisdiction and a dismissal on the merits, as set forth in Fed. R. Civ. P. 41(b) and explained by many other circuits. *Third*, the court of appeals ignored the requirement of 28 U.S.C. § 1447(c) that a removed case shall be remanded if, at any time before final judgment, it appears the court lacks subject-matter jurisdiction. *Fourth*, by allowing the lower court decision to stand in the absence of subject-matter jurisdiction, the court of appeals deprived California of the constitutional right to decide petitioners' state-law claims in its own courts. *Fifth*, the court of appeals has affirmed the district court's application of federal common law as the rule of decision of petitioners' state-law claims. This ruling violates the *Erie* Doctrine and this Court's many pronouncements against judicial formulation of rules of decision.

ARGUMENT

ISSUE 1. SUBJECT-MATTER JURISDICTION

A. The district court's determination that the Warsaw Convention does not apply deprived the court of supplemental jurisdiction over the remaining state-law claims.

The Ninth Circuit ruled that the district court may decide state-law claims under the supplemental jurisdiction provided in 28 U.S.C. § 1367 after it has determined that the federal treaty upon which the court's original jurisdiction was predicated does not apply. The court of appeals thus allowed the district court to proceed to judgment in the absence of federal subject-matter jurisdiction, contravening the jurisdictional requirements of Article III, § 2, cl. 1 of the Constitution.

The court of appeals rationalized this ruling by noting that, since the complaint alleged a claim based on the Warsaw Convention, a federal treaty, it appeared there was federal question jurisdiction under 28 U.S.C. § 1331 at the time the complaint was removed to the district court. Having exercised its discretionary supplemental jurisdiction under section 1367 shortly after the removal, that supplemental jurisdiction was not defeated by the court's subsequent determination that the federal treaty never applied. (Pet. App. 13)

B. The Warsaw claim was not dismissed on the merits.

Further, the court of appeals characterized the district court's determination that the Warsaw Convention does not apply as a dismissal of the Warsaw claim *on the merits*. This led the appeals court to cite a Second Circuit

case holding that the district court may decide state-law claims after all federal claims have been resolved *on the merits*. (Pet. App. 10 (citing *Parker PPA v. Della Rocco, Jr.*, 252 F.3d 663, 666 (2d Cir. 2001))).

The flaw in this reasoning is that the district court did not decide the Warsaw claim on the merits; it did not hold either that the petitioners were entitled to recover under the Convention or that they were not. Instead, it determined that the Convention did not apply. This entails the conclusion, suppressed by the court of appeals, that there was no federal subject-matter jurisdiction because the Convention, the sole basis for such jurisdiction, did not apply.

By confounding the crucial difference between lack of subject-matter jurisdiction and a decision on the merits, the court of appeals' opinion means that the mere allegation of a claim arising under the Constitution, laws, or treaties of the United States is sufficient, in a removal case, to permit the district courts to decide state-law claims even after determining that there is no federal-question claim under 28 U.S.C. § 1331.

The district court's determination that the Warsaw Convention did not govern this loss was not a decision on the merits. As this Court explained in *Ruhrgas AG v. Marathon Oil Co.*[3]:

> Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority

[3] 526 U.S. 574 (1999).

> over the parties (personal jurisdiction), so that the court's decision will bind them.

Id. at 577. The district court determined, to use the words of *Ruhrgas*, that it did not have authority over "the category of claim in suit" – a claim stated under the Warsaw Convention. As the Warsaw claim was the only one that could have conferred federal subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1441(b), the conclusion that Warsaw does not apply could not have been, as the court of appeals erroneously asserts, a decision on the merits. Lacking subject-matter jurisdiction, the district court *could not reach the merits.*

Other courts of appeals hold that the existence of subject-matter jurisdiction is a necessary prerequisite to decision of any case on the merits. *See, e.g., Canada Life Assurance Co. v. Converium Rückversicherung (Deutschland) AG*, 335 F.3d 52, 59 (2d Cir. 2003) (court cannot reach merits because there is no subject-matter jurisdiction under Air Stabilization Act); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 702 (7th Cir. 2003) ("If we do not have federal subject matter jurisdiction, then we are not allowed to reach the merits."); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1258 (11th Cir. 2000); *Sealed Appellant 1 v. Sealed Appellee*, 199 F.3d 276, 278 (5th Cir. 2000).

The court of appeals' decision also contradicts the plain language of Fed. R. Civ. P. 41(b), which provides that "a dismissal for lack of jurisdiction" does not operate as an adjudication upon the merits:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of

> any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b) (emphasis added).

As the District of Columbia Circuit once explained:

> Under rule 41(b), a dismissal for lack of subject matter jurisdiction does not operate as an adjudication on the merits, and therefore is not a proper issue for summary judgment. *See* Fed. R. Civ. P. 41(b). Moreover, rule 12(h)(3) requires a court to dismiss an action whenever it appears that the court lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

D.C. Transit System, Inc. v. United States, 230 U.S. App. D.C. 381, 383 n.1, 717 F.2d 1438, 1440 n.1 (1983). *See also Leaf v. Supreme Ct. of State of Wisconsin*, 979 F.2d 589, 595 (7th Cir. 1992), *cert. denied*, 508 U.S. 941 (1993) ("[A] dismissal for lack of subject-matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and 41(b) is not a decision on the merits. . . . ")

This Court recently explained:

> Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal (a dismissal is "upon the merits," with the three stated exceptions, unless the court "otherwise specifies").

Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001).

Two further effects of the court of appeals' decision – both seen in this case – are: (1) that the district court may then enter a final judgment on the state-law claims despite the absence of federal subject-matter jurisdiction at the time of final judgment; and (2) that it creates a circuit conflict on the question of exercising supplemental jurisdiction in cases where all federal claims are dismissed for lack of subject-matter jurisdiction.

C. The court of appeals ignored the removal statute.

The removal statute provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . . " 28 U.S.C. § 1447(c). If the court of appeals is wrong in characterizing the district court's conclusion that the Warsaw Convention does not apply as a dismissal on the merits, then the appellate decision permitted the court to escape the mandatory remand required by section 1447(c) in cases where it appears that the district court lacks subject-matter jurisdiction. *Compare Ruhrgas*, 526 U.S. at 583-84 (explaining that courts must police themselves by heeding, inter alia, the section 1447(c) requirement to remand if subject-matter jurisdiction appears lacking).

D. The court of appeals' decision conflicts with decisions of other circuits.

The result in this case conflicts with decisions of the Federal Circuit, the District of Columbia Circuit, the Second Circuit, and the Sixth Circuit. These courts hold that when the only federal claim is dismissed for lack of

subject-matter jurisdiction, the district court lacks the original jurisdiction necessary to exert supplemental jurisdiction over remaining state-law claims. *See Textile Products, Inc. v. Mead Corp.*, 134 F.3d 1481, 1485-86 (Fed. Cir. 1998); *Saksenasingh v. Sec'y of Education*, 326 U.S. App. D.C. 370, 374, 126 F.3d 347, 351 (1997); *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255-56 (6th Cir. 1996); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187-88 (2d Cir. 1996).

E. The court of appeals' decision deprives California of an important constitutional right.

By deciding petitioners' state-law claims after determining it had no subject-matter jurisdiction over their only federal claim, and by further applying federal rather than state law as the rule of decision of those state-law claims, the district court doubly infringed upon the rightful independence of the state of California. By its affirmance, the court of appeals did likewise.

> [I]f a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.

University of South Alabama v. American Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999).

The court of appeals' decision thus raises serious federalism concerns. As this Court explained more than sixty years ago:

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine

> their own jurisdiction to the precise limits which the statute has defined.

Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 109 (1941) (construing 28 U.S.C. §§ 1441, 1445 & 1447).

F. Relief Requested

This Court should grant the writ, and vacate and reverse the court of appeals' decision with instructions to remand the petitioners' state-law claims. This would bring the Ninth Circuit into conformity with the fundamental Article III requirement of subject-matter jurisdiction. If this decision is not reversed, it will stand as the controlling law of the nation's largest circuit, and will deprive countless future litigants of their rightful day in the state court in which they filed their claims, while abridging the constitutional right of states within the circuit to resolve controversies in their own courts. Reversal will ensure that the mere allegation of a federal claim does not create a one-way flow of cases from state to federal courts, and will curtail the entry of final judgment on state-law claims in the absence of federal subject-matter jurisdiction.

As this Court observed in *Ruhrgas*:

> Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level.

526 U.S. at 583 (citing Fed. R. Civ. P. 12(h)(3) and 28 U.S.C. § 1447(c)).

ISSUE 2. RULE OF DECISION

The district court concluded that the only claims before it, after its decision of respondent's motion for summary adjudication, were claims arising under California law. (Pet. App. 21) Despite this, the district court applied what it described as "federal common law" to decide the key issue of whether respondent could limit its liability for the theft of the goods. (Pet. App. 38) The court of appeals agreed that the only claims were state-law claims, yet it affirmed the lower court's choice of federal common law for the substantive rule of decision on the issue of whether respondent was entitled to limit liability. (Pet. App. 16)

A. The court of appeals violated the *Erie* Doctrine.

If a district court proceeds to exercise supplemental jurisdiction over state-law claims, particularly when there is no federal subject-matter jurisdiction, it should at least be required to choose and follow the law of the state in question – in this case, California. The *Erie*[4] Doctrine is just as pertinent to state-law claims decided under the district court's supplemental jurisdiction and former pendent jurisdiction as it is to claims sounding in diversity. *See, e.g., Crowe v. Wiltel Communications Systems*, 103 F.3d 897, 899 (9th Cir. 1996) (supplemental jurisdiction); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (pendent jurisdiction); *Mangold v. California Public Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995).

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[4] Erie R. Co. v. Tompkins, 364 U.S. 68 (1938).

The court of appeals explained that it was required by its own circuit precedent to cast aside the *Erie* Doctrine and apply the Ninth Circuit's version of "federal common law" to decide the extent of Schenker's liability under California law. (Pet. App. 16 (citing *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999))).[5]

In *Read-Rite*, the Ninth Circuit, sua sponte, addressed the issue of what law governs a shipper's claim for damage to goods during transit but prior to the applicability of the Warsaw Convention. Although the goods in *Read-Rite* moved by air under the Convention, the damage occurred before they reached the airport – with the result that the Convention, by its own terms, did not apply. *See Read-Rite*, 186 F.3d at 1193-94; Warsaw Convention art. 18. Although the damage took place near London's Heathrow Airport, the Ninth Circuit – drawing analogies to the days when the Civil Aeronautics Board regulated U.S. interstate air transportation – held that the federal common law created during the regulation of interstate air transit continues to govern before and after the period when Warsaw applies. *See id.* at 1195-98. The court went on to hold that this federal common law continues to apply even though Congress, through the Airline Deregulation Act of 1978[6] and the Federal Aviation Administration Authorization Act of

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[5] Petitioner's counsel of record herein was Burlington's counsel in *Read-Rite*, but did not advocate the choice-of-law result which the court of appeals crafted sua sponte.

[6] 92 Stat. 1705.

1994,[7] deregulated the airlines and largely vacated the field.

The *Read-Rite* rule applied by the court below not only flies in the face of deregulation and the restoration of state law in the field of U.S. interstate air transportation, it also overlooks the fact that federal regulation of international air transportation has never extended to land transportation or storage of the goods before or after the period when the Warsaw Convention applies. The Warsaw Convention's application to loss or damage does not extend to the period before the goods reach, or the period after they leave, the airport grounds. The Convention creates a rebuttable presumption that the loss occurred during the air transportation, but allows proof that the loss did not happen during such transportation (as the district court concluded below):

> The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Warsaw Convention, art. 18(3).

Moreover, the *Read-Rite* rule applied by the court below conflicts with this Court's determination that state

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[7] 49 U.S.C. § 40120.

law governs whether the Warsaw carrier is liable for the theft of goods by its employees. In *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), this Court held that the text of the Warsaw Convention requires that issues of theft and other wilful misconduct arising under the convention be resolved by applying the substantive law of the state where the loss occurred. *See id.* at 229. In one case, *Insurance Co. of North America v. Federal Express Corp.*, 189 F.3d 914 (9th Cir. 1999), a panel of the Ninth Circuit followed this Court's ruling on the application of state law, but Judge William Fletcher, in a concurring opinion, insisted that federal common law should apply despite *Zicherman*, and repeatedly cited his own opinion in *Read-Rite* as counter-authority to the majority's adherence to this Court's *Zicherman* ruling. *See Insurance Co.*, 189 F.3d at 923-29 (Fletcher, J., concurring).[8]

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[8] *Insurance Co.* was argued three months before, but decided after, *Read-Rite*. Judge Fletcher sat on both panels. The judge disagreed with the majority's application of state law in *Insurance Co.* and tried, in his concurring opinion in that case, to bind them to the federal-common-law precedent established in *Read-Rite* (cited eight times in the concurring opinion). This suggests the possibility that Judge Fletcher delayed his concurring opinion in *Insurance Co.* until after issuing his opinion in *Read-Rite* in order to cite the latter in the former. A plausible interpretation of Judge Fletcher's purpose in arguing for the application of federal common law to losses found to have occurred before or after the applicability of Warsaw is that he wished to eliminate the prospect of dismissals for lack of subject-matter jurisdiction once the district court, or the court of appeals, concludes that a given loss did not occur during the transportation by air as defined in Warsaw art. 18. This purpose, however reasonable, does not comport with the *Erie* Doctrine or with this Court's subsequent discussions of the narrow limits of federal common law. See, e.g., Alden v. Maine, 527 U.S. 706, 754 (1999) (quoting *Erie*, 304 U.S. at 78-79); Atherton v. FDIC, 519 U.S. 213, 218 (1997) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68

(Continued on following page)

Citing *Read-Rite* as controlling circuit precedent, the court below acknowledged the contradiction between *Insurance Co.* and *Read-Rite*:

> It may seem nonintuitive that state law controls once the shipment is at the airport because an international treaty governs the commercial relationships, while federal common law controls when the shipment is sitting within the state, is outside the airport at a South San Francisco warehouse and beyond the scope of the Warsaw Convention. But that's the way it is, under our controlling authority.

(Pet. App. 16)

Apparently because of *Read-Rite*'s emphasis on applying federal common law, the court of appeals did not perceive that the choice-of-law issue is governed by *Erie*, and thus did not pay heed to this Court's teachings in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). In *O'Melveny*, the FDIC sued a California law corporation on a cause of action created by California law. A key issue was whether the knowledge of corporate officers acting against the corporation's interests could be imputed to the corporation. The Ninth Circuit ruled that federal common law provided the rule of decision on this issue,[9] but this Court, unanimously reversing, held that state substantive law should be applied because this was a state-law cause of action. *See O'Melveny*, 512 U.S. at 83.

(1966); Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

[9] O'Melveny & Myers v. FDIC, 969 F.2d 744, 751 (9th Cir. 1992), *rev'd*, 512 U.S. 79 (1994).

This Court disagreed with the Ninth Circuit's choice of a federal rule of decision "as it is so plainly wrong. 'There is no federal general common law.'" *Id.* (quoting *Erie*, 364 U.S. at 78). In a concurring opinion, Justice Stevens observed:

> Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.[10]

By formulating federal common law to apply to losses occurring before and after the applicability of the Warsaw Convention, *Read-Rite* violated this Court's instruction about the narrow limits of federal common law:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Industries, 451 U.S. at 641.

B. Relief Requested

The writ should be granted and the decision below vacated and reversed to bring the Ninth Circuit back in

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[10] *O'Melveny*, 512 U.S. at 90 (Stevens, J., joined by Blackmun, O'Conner & Souter, JJ., concurring).

line with the *Erie* Doctrine, so as to ensure that state-law claims in the district courts of this circuit will not continue, as in *Read-Rite* and in this case, to be decided by federal common law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 4, 2004

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBINGIA VERSICHERUNGS A.G., a foreign corporation; SIEMENS COMPONENTS PTE. LTD., a foreign corporation, *Plaintiffs-Appellants,* v. SCHENKER INTERNATIONAL INC., a corporation, *Defendant-Appellee.*	No. 01-16558 D.C. No. CV-99-02989-MHP ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
October 10, 2002 – San Francisco, California

Filed September 15, 2003
Amended December 3, 2003

Before: Andrew J. Kleinfeld and Johnnie B. Rawlinson, Circuit Judges, and Justin L. Quackenbush,* District Judge.

Opinion by Judge Kleinfeld

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* The Honorable Justin L. Quackenbush, Senior United States District Judge for Eastern Washington, sitting by designation.

COUNSEL

Michael W. Lodwick, Haight Brown & Bonesteel LLP, Santa Ana, California, for the appellants.

James B. Nebel (briefed) and Jeanine S. Tede (argued), Flynn, Delich & Wise, San Francisco, California, for the appellee.

ORDER

The Opinion filed on September 15, 2003, and appearing at 344 F.3d 931 (9th Cir. 2003), is amended as follows:

At page 934, paragraph beginning "After discovery, the case was settled," delete the last sentence and replace it with the following:

> Schenker and Albingia stipulated to facts strongly supporting the conclusion that the chips had probably been stolen by Schenker employees while in Schenker's warehouse.

At page 934, last paragraph, beginning "The parties filed cross motions," delete the first two sentences and replace them with the following:

> Schenker filed a motion for summary adjudication on the applicability of the Warsaw Convention and the monetary limitations in the waybill. The district court noted that Albingia, in its response to the summary adjudication motion, did not argue for remand in the event the Warsaw Convention did not apply.

At page 935, last paragraph, beginning "Thus by the time the district court entered judgment," second sentence, replace "and the parties stipulated" with the following:

based on spoliation of evidence

At page 936, paragraph beginning "The district court, in a single ruling," delete the first sentence and replace it with the following:

> The district court, in a single ruling on the motion for summary adjudication, held that because the chips were stolen in Schenker's off-airport warehouse, the Warsaw Convention did not apply, and the contractual limitation to $20 per kilogram was valid under federal common law.

With those amendments, Judges Kleinfeld and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Quackenbush so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has called for a vote to rehear this matter en banc. No further petitions for panel rehearing or rehearing en banc will be entertained.

The petition for rehearing en banc is denied.

OPINION

KLEINFELD, Circuit Judge:

This case raises questions about supplemental jurisdiction after removal, and about choice of law in a challenge to a limitation of liability in a waybill.

Facts

Siemens, a German manufacturer, made computer chips in Singapore, and sent them to San Jose, California, for testing. When the cartons containing the boxes of chips came back to Siemens' factory in Singapore, "one of the

three inner boxes in each carton contained a brick instead of circuits."

Siemens had purchased insurance from Albingia Versicherungs, which paid Siemens about $235,000 for the stolen chips. Albingia brought this subrogation claim against all the firms in the shipping chain. Albingia sued in the California Superior Court for San Francisco County. The complaint stated five causes of action, the first arising under the Warsaw Convention, the other four arising under California state law for negligence, breach of contract, breach of the duty of care by bailee, and conversion. One of the defendants, Eva Air, an international air carrier, removed the case to federal court based on the Warsaw Convention claim.

After discovery, the case was settled as to all defendants but one, Schenker International, a freight forwarder. Schenker operated a warehouse in South San Francisco where the chips had been stored prior to transport on Eva Air back to Singapore. Schenker and Albingia stipulated to facts strongly supporting the conclusion that the chips had probably been stolen by Schenker employees while in Schenker's warehouse.

Siemens's waybills contained a limitation on liability supplementing the liability limitation in the Warsaw Convention. The contract said that, with exceptions immaterial to this case, liability where the Warsaw Convention did not apply was limited to $20 per kilogram. The waybill says that this amount is designed to be the approximate value of the "250 French gold francs" specified as the Warsaw Convention limit. Thus Schenker's idea was plainly, "our liability is limited to $20 per kilo if the Warsaw Convention does apply, and also if it doesn't."

Schenker's branch manager and warehouse manager watched a videotape from their closed-circuit security camera to figure out whether the shipment had been weighed when it came in. But somehow all the videotapes made from the security cameras during the whole four days the chips were in Schenker's care disappeared. The district court presumed that the chips were stolen by employees, for their own benefit and not for Schenker's benefit. This presumption has not been challenged in this appeal.

Schenker filed a motion for summary adjudication on the applicability of the Warsaw Convention and the monetary limitations in the waybill. The district court noted that Albingia, in its response to the summary adjudication motion, did not argue for remand in the event Warsaw Convention did not apply. The district court determined that the Warsaw Convention did not apply, that the limitation on the waybill was valid under federal common law, and that Albingia was entitled to summary judgment in the amount of $5394, computed under the waybill limitations. Albingia appeals, to get the rest of the $235,000 plus expenses that it is out of pocket to its insured on the stolen shipment.

Analysis

We review de novo the district court's grant of summary judgment.[1] Albingia argues on appeal that once the district court held that the Warsaw Convention did not apply, the basis of removal – federal question jurisdiction –

[1] *See Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir. 2002).

was gone, as was jurisdiction to consider the remaining state law claims. Albingia therefore argues that the district court should have remanded the state law claims back to the state Superior Court, because it lacked supplemental jurisdiction to rule on them. And Albingia further argues that even if the district court had supplemental jurisdiction, the district court should have applied California law rather than federal common law, and that under California law Albingia would have avoided the $20 per kilogram liability limitation.

A. Jurisdiction

Eva Air properly removed the case from state to federal court, because "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under . . . treaties or laws of the United States shall be removable. . . ."[2] No party filed a motion to remand upon removal. The complaint was drawn claiming a right to recover under a treaty and federal statute,[3] the federal aspect was central to the claim and was not insubstantial or frivolous – for all Albingia knew, the chips were stolen while aboard Eva Air. Therefore, jurisdiction at the time of removal existed regardless of whether the Warsaw Convention ultimately turned out to supply a basis for recovery.[4]

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[2] 28 U.S.C. § 1441(b).

[3] Convention and additional protocol between the United States of America and other powers relating to International Air Transportation (Warsaw Convention), 49 Stat. 3000, (Oct. 29, 1934), *codified at note following* 49 U.S.C. § 40105.

[4] *Bell v. Hood*, 327 U.S. 678, 682 (1946).

There is also no serious question that in its summary judgment order, the district court first determined that the Warsaw Convention did not apply and then determined the state law limitations issue in favor of Schenker. We held in *Read-Rite Corporation v. Burlington Air Express, Ltd.*[5] that where the loss to the goods occurs outside the airport, the Warsaw Convention does not apply.[6] The Convention applies to transportation by air but not everything leading up to transportation by air.

Thus by the time the district court entered judgment in the case at bar, the federal question that justified removal had disappeared. The claim under the Warsaw Convention disappeared once the district court presumed based on spoliation of evidence that the bricks had been substituted for the chips in Schenker's South San Francisco warehouse.[7]

Albingia argues that once the district court correctly so decided, that should have been the end of the case in federal court. But instead of dismissing the state law claims or remanding them to state court, the district court exercised supplemental jurisdiction over them. Albingia contends that there was no supplemental jurisdiction over the remaining state law claims. As stated, *supra,* Albingia did not raise this issue until after the district court had ruled against it on its state law claims.

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[5] 186 F.3d 1190 (9th Cir. 1999).

[6] *Id.* at 1194 (holding that damage occurring to goods outside of Heathrow Airport is not covered by the Warsaw Convention).

[7] *See id.*

The supplemental jurisdiction statute provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy."[8] In this case, the district court had a basis of original jurisdiction because of the federal question raised by Albingia's Warsaw Convention claim. Further, the state law claims plainly form part of the same case or controversy as the federal claim. Just like the Warsaw Convention claim, the state claims are four different theories for getting reimbursed for the $235,000 that Albingia paid Siemens for the stolen chips. The removal was without question proper at the time it was accomplished, because of the Warsaw Convention claim, so the district court plainly had supplemental jurisdiction at that time over the state law claims.[9]

The district court, in a single ruling on the motion for summary adjudication, held that because the chips were stolen in Schenker's off-airport warehouse, the Warsaw Convention did not apply, and the contractual limitation to $20 per kilogram was valid under federal common law. Albingia argues that upon deciding that the Warsaw Convention did not apply, the district court lost jurisdiction to decide that the contractual limitation applied. That contention is incorrect. Where removal was proper, but the federal question claim is defeated on the merits, the

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[8] 28 U.S.C. § 1367(a).

[9] *See* 28 U.S.C. § 1441.

district court nevertheless may in its discretion retain supplemental jurisdiction over the state law claims.[10] The Supreme Court held in *Bell v. Hood* that when a well-pleaded complaint states a federal claim, "[j]urisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which the petitioners could actually recover," and "[i]f the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."[11] In the case at bar, the federal claim was dismissed on the merits rather than for lack of jurisdiction, because it turned out that the chips were stolen at Schenker's off-airport warehouse. Jurisdiction existed because the pleading asserted, without frivolousness, that the Warsaw Convention gave Albingia a claim.

It is arguably an obstacle to this interpretation that the statute governing procedure after removal has subsequently been amended. In pertinent part, the removal statute, section 1447(c), provides that motions to remand for procedural defects must be made within 30 days of removal, but "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[12] Wright & Miller says that "[a]n interpretive debate has arisen whether the language 'lacks subject matter jurisdiction' in the current

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[10] 28 U.S.C. § 1367(c); *Acri v. Varian Assoc.*, 114 F.3d 999, 1000-01 (9th Cir. 1997) (en banc).

[11] *Bell*, 327 U.S. at 682.

[12] 28 U.S.C. § 1447(c).

text of Section 1447(c) refers only to defects existing at the time of removal or takes into account subsequent events."[13] The words "any time" and "lacks," in the present tense, suggest mandatory remand, but the word "case" suggests that jurisdiction must be lacking over the entire case, not merely a claim within the case.

It was well-settled under the previous version of the removal statute[14] that a federal district court retains "the power to hear claims that would not [have been] independently removable even after the basis for removal jurisdiction is dropped from the proceedings."[15] Our sister circuits that have ruled on the question interpret the statute as amended *not* to deprive the district court of jurisdiction to decide the related state claims even though the federal claim upon which removal was based is dismissed on the merits.[16] Thus, in our post-amendment en banc decision in *Acri v. Varian Associates,*[17] we held that

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[13] Wright & Miller, *Federal Practice and Procedure: Jurisdiction and Related Matters 3d,* § 3739 at 435.

[14] Prior to 1988, the comparable subsection to the removal statute in question provided that "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case."

[15] *See Harrell v. 20th Century Ins., Co.,* 934 F.2d 203, 205 (9th Cir. 1991) (internal quotation omitted); *see also Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 355 n.11 (1988) (discussing that the pre-1988 version of section 1447(c) "do[es] not apply to cases over which a federal court has pendent jurisdiction. Thus, the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all.")

[16] *See Parker PPA v. Della Rocco, Jr.,* 252 F.3d 663, 666 (2d Cir. 2001).

[17] 114 F.3d 999 (9th Cir. 1997) (en banc).

even if all federal claims are dismissed before trial, this "has never meant that they [state law claims] *must* be dismissed."[18] This interpretation preserves coherence with the new supplemental jurisdiction statute, which provides that where the district court has original jurisdiction over a federal claim, it "shall have supplemental jurisdiction" over related state law claims.[19]

The supplemental jurisdiction statute, section 1367, says that district courts "shall have" jurisdiction over the non-federal claims forming part of the same case or controversy, which they "may decline to exercise" under denoted circumstances,[20] while the procedure after removal statute, section 1447, says that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[21] Here is how we reconcile the "may decline to exercise" language of the supplemental jurisdiction statute with the "shall be remanded" language of the procedure after removal statute: if state law claims are asserted as part of the same case or controversy with a federal claim, the district court has discretion to exercise supplemental jurisdiction over the remaining state law claims and the mandatory remand provision of the procedure after removal statute does not apply. Under the plain language of the statutes, logically it cannot "appear[] that the district court lacks jurisdiction" under 1447(c) if it "shall have" jurisdiction under 1367.

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[18] *Id.* at 1000.

[19] 28 U.S.C. § 1367(a).

[20] 28 U.S.C. § 1367(c).

[21] 28 U.S.C. § 1447(c).

The Second Circuit held in *Parker PPA v. Della Rocco, Jr.,*[22] that "§ 1447(c) merely addresses the *consequences* of a jurisdictional flaw, *i.e.* it mandates a remand rather than a dismissal."[23] *Parker* relies on language in a Supreme Court decision, *International Primate Protection League v. Administrators of Tulane Educational Fund*,[24] that, in somewhat different circumstances, reads the new language in section 1447(c) to mean that "a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand."[25] That is to say, section 1447(c) does not mean that if the federal claim drops out, the district court must remand; it means that if there is no jurisdiction – federal question, supplemental, diversity, or otherwise – the district court must remand the removed case rather than dismissing it. Our cases already bear this out; now we hold explicitly what, in *Acri* and other cases,[26] we have held implicitly: section 1447(c)

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[22] 252 F.3d 663 (2d Cir. 2001).

[23] *Id.* at 666.

[24] 500 U.S. 72 (1991), *superseded by statute on unrelated grounds,* as explained by *Dalrymple v. Grand River Dam Authority,* 145 F.3d 1180, 1184 n.6 (10th Cir. 1998).

[25] *Id.* at 87.

[26] *See, e.g., Herman Family Revocable Trust v. Teddy Bear,* 254 F.3d 802 (9th Cir. 2001) (holding that the exercise of supplemental jurisdiction over nonfederal claims was improper where there was never a valid basis for removal under federal admiralty jurisdiction); *Duncan v. Al Stuetzle,* 76 F.3d 1480, 1491 (9th Cir. 1996) (holding that the district court was required to remand to state courts for lack of subject matter jurisdiction under section 1447(c) where the state court complaint failed to state a federal question under the Lanham Act as it only raised state law issues). *Compare with, Acri,* 114 F.3d at 1000-01 (holding that properly removed nonfederal claims need not be remanded even where the district court dismissed the claim on which removal was based).

means that if it is discovered at any time in the litigation that there is no federal jurisdiction, a removed case must be remanded to the state court rather than dismissed. Section 1447(c) does not mean that if a facially valid claim giving rise to federal jurisdiction is dismissed, then supplemental jurisdiction is vitiated and the case must be remanded. Once supplemental jurisdiction exists, it remains, subject to the discretionary provision for remand in section 1441.

In the case at bar, because Albingia's state law complaint was properly removed to the district court due to the federal question asserted by Albingia's Warsaw Convention claim, the district court had supplemental jurisdiction over the state law claims. The district court's supplemental jurisdiction over the state law claims was not destroyed by dismissal of the Warsaw Convention claim. This is consistent with the long established approach to diversity cases, where even if the damages proved turn out to be less than the jurisdictional amount, the district court nevertheless retains jurisdiction to render a final judgment on the merits.[27] Supplemental jurisdiction is not destroyed by elimination of the basis for original jurisdiction.

The only remaining issue relating to jurisdiction is whether, after the federal claim was dismissed, the district court abused its discretion by retaining the case rather

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[27] *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938); *Singer v. State Farm Mutual Auto. Ins. Co.*, 116 F.3d 373, 375 (9th Cir. 1997).

than remanding it.[28] Our en banc decision in *Acri* holds that although the district court "may," under section 1367(c), decline to exercise its supplemental jurisdiction in these circumstances, and ordinarily "should" dismiss the state law claims under *United Mine Workers v. Gibbs,* that "has never meant that they *must* be dismissed."[29] Here, considering the *Acri* factors,[30] there was plainly no abuse of discretion, because Albingia waited until the dealer turned up his hole card, in the court's summary judgment decision, before claiming that the adverse decision should be vacated because federal question jurisdiction had disappeared. We decline to let Albingia take its chips off the table because it didn't like the dealer's hand.

B. Choice of Law

Albingia argues that, even if the district court did have jurisdiction and permissibly exercised it, the choice of law decision is erroneous. The parties disagree whether, under California law, the $20 per kilogram limit in the waybill is enforceable. Although the disagreement is arguable,[31] we need not resolve the disagreement under

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[28] *See Bryant v. Adventist Health,* 289 F.3d 1162, 1169 (9th Cir. 2002).

[29] *Acri,* 114 F.3d at 1000 (emphasis in original) (citing *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966)).

[30] *See* 28 U.S.C. § 1367(c) (discussing factors to consider in evaluating whether to remand); *Acri,* 114 F.3d at 1001 (holding that considerations of fairness, judicial economy, convenience to the parties, and comity sometimes indicate a federal court should retain jurisdiction).

[31] *Compare* California Civil Code § 2175 (liability limitation seemingly invalid), *with HIH Marine Ins. Serv., Inc. v. Gateway Freight Serv.,* 96 Cal.App.4th 486 (2002) (liability limitation valid).

California law. Albingia does not dispute that if federal common law applies, the limit is enforceable. We review de novo a district court's choice of law decision.[32]

Two prior Ninth Circuit decisions that came down three weeks apart control the determination of which law applies. Our decision in *Read-Rite Corp. v. Burlington Air Express*[33] holds that where the Warsaw Convention is inapplicable because the damage occurred off-airport, federal common law applies to determine the validity of a waybill limitation on liability for damage to goods being shipped in interstate or international commerce by air.[34] Under federal common law, the limit on liability is valid and enforceable if the shipper has reasonable notice of it and a fair opportunity to purchase the means to avoid it.[35] Purchasing separate insurance on the cargo, as Siemens did from Albingia, satisfies both requirements.[36] *Read-Rite* controls the case at bar and establishes, first, because Schenker's warehouse was outside the airport, the Warsaw Convention did not apply, and second, because Siemens bought insurance on the chips from Albingia, in obvious recognition of the waybill limitation, the $20 per kilogram limit is valid under controlling federal common law.

---

[32] *Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002).

[33] 186 F.3d 1190 (9th Cir. 1999).

[34] See also *Kesel v. United Parcel Serv., Inc.*, ___ F.3d ___, 2003 WL 21782526 at *2 n.2 (9th Cir. Aug. 4, 2003) ("We agree with the district court that the Warsaw Convention ... does not apply to [plaintiff's] claims. [Plaintiff] alleges that the package disappeared, not during the flight from Odessa to the United States, but after it arrived at UPS's Kentucky warehouse. Federal common law governs liability limits on shipments by air within the United States." (internal citations omitted)).

[35] *Id.* at *3. *See Read-Rite*, 186 F.3d. at 1198.

[36] *Read-Rite*, 186 F.3d at 1198.

Our decision three weeks after *Read-Rite* in *Insurance Company of North America v. Federal Express Corporation,*[37] concluded that state law applied. But it is distinguishable on its facts. In *Federal Express,* as in the case at bar, computer chips were stolen out of a warehouse by employees. The difference, though, is that in *Federal Express* the warehouse was within the airport. The Warsaw Convention applies once the goods are within the airport.[38] In *Federal Express* we read Article 25 of the Warsaw Convention to refer us to state law to determine whether willful misconduct by a shipper's employee invalidates the limit on liability.[39]

Federal Express and *Read-Rite* come out differently because the Warsaw Convention applies in the former but not the latter. It may seem nonintuitive that state law controls once the shipment is at the airport because an international treaty governs the commercial relationships, while federal common law controls when the shipment is sitting within the state, is outside the airport at a South San Francisco warehouse and beyond the scope of the Warsaw Convention.[40] But that's the way it is, under our controlling authority.

AFFIRMED.

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[37] 189 F.3d 914 (9th Cir. 1999).

[38] *Read-Rite,* 186 F.3d at 1194.

[39] *Federal Express,* 189 F.3d at 917-21.

[40] *See id.* at 923-28 (W. Fletcher, J., concurring) (arguing that federal common law should have been applied by the majority in *Federal Express*).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALBINGIA VERSICHERUNGS A.G., SIEMENS COMPONENTS PTE. LTD.,

Plaintiffs,

v.

EVA AIRWAYS CORP., SCHENKER INT'L, INC., GREATER BAY TRANSP., and DOES ONE THROUGH ONE HUNDRED,

Defendants. /

No. C 99-2989 MHP

JUDGMENT
(FED. R. CIV. P. 58)

(Filed Jun. 4, 2001)

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed granting summary adjudication in favor of defendant SCHENKER INT'L, INC.;

IT IS ORDERED AND ADJUDGED that judgment is entered AGAINST DEFENDANT SCHENKER INT'L. INC., and IN FAVOR OF PLAINTIFFS ALBINGIA VERSICHERUNGS A.G. and SIEMENS COMPONENTS PTE in the amount of $5,394.00, with each party to bear its own costs.

Dated: 6/4/01

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

United States District Court
for the
Northern District of California
June 6, 2001

*** * CERTIFICATE OF SERVICE * ***

Albingia Case Number: 3:99-cv-02989

vs

Eva Airways Corp.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 6, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Clerk

BY: /s/ [Illegible]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALBINGIA VERSICHERUNGS A.G., and SIEMENS COMPONENTS PTE. LTD.,

Plaintiffs,

v.

EVA AIRWAYS CORP., SCHENKER INTERNATIONAL, INC., GREATER BAY TRANSPORT., and DOES 1-100

Defendants. /

No. C 99-02989 MHP

ORDER

(Filed Dec. 1, 2000)

Plantiffs brought this action in state court based in part on a claim under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 ("Warsaw Convention"). Defendants removed the action to this court pursuant to 28 U.S.C. section 1331 on the basis of plaintiffs' Warsaw Convention claim. Plaintiffs did not move to remand and instead responded to defendant Schenker's motion for summary adjudication. In response to defendant Schenker's motion, plaintiff conceded that the Warsaw Convention does not apply to this case. The court found that the Warsaw Convention does not apply and granted Schenker's motion on July 5, 2000.

On July 31, 2000, plaintiffs filed a document entitled "Suggestion that the Court Lacks Subject Matter

Jurisdiction." Plaintiffs contended that because the Warsaw Convention does not apply to this case, the court lacks jurisdiction to proceed on the other issues raised in Schenker's motion. In essence, plaintiffs' asked the court to vacate its order granting summary adjudication and remand the action to state court. The court denied plaintiffs' suggestion to remand on August 17, 2000.

Plaintiffs' motion to remand is now before the court. Plaintiffs contend that the dismissal of the Warsaw Convention claim, "the claim that provided the sole basis for this Court's exercise of supplemental jurisdiction over plaintiffs' remaining state-law claims[,] in turn requires the Court to remand this case' to state court. For the reasons stated in the court's August 17, 2000 order, this motion is not well taken.

As plaintiffs' claim "arising under" the Warsaw Convention existed at the time of removal, this court has jurisdiction to adjudicate the action even though only state law claims remain. *See Nishimoto v. Federman-Bachrach & Assoc.*, 903 F.2d 709, 715 (9th Cir. 1990) ("Dismissal of the federal claims does not deprive a federal court of the power to adjudicate the remaining pendant state claims."); *accord* Schwarzer et al., *Federal Procedure Before Trial*, 2:1067. The decision whether to exercise jurisdiction over the remaining state law claims, remand or dismiss the action, is committed to the discretion of the district court. *See* Schwarzer et al. at 2:1068. The district court is in the best position to judge the extent of resources invested in the case and to consider judicial economy and efficiency. *See Schneider, TRW, Inc.*, 938 F.2d 986, 993-94 (9th Cir. 1991). Here, the court exercised its discretion to retain jurisdiction

over the action until it is resolved. *See* August 17, 2000 Order at 2.

Plaintiffs' motion to remand is DENIED.

Dated: December 1, 2000.

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

United States District Court
for the
Northern District of California
December 4, 2000

* * CERTIFICATE OF SERVICE * *

Case Number: 3:99-cv-02989

Albingia

vs

Eva Airways Corp.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 4, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or

by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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By: /s/ [Illegible]
A Bowser, Deputy Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALBINGIA VERSICHERUNG A.G., a foreign corporation; and SIEMENS COMPONENTS PTE.LTD., a foreign corporation,

Plaintiff(s),

vs.

EVA AIRWAYS CORPORATION, a business entity or corporation; SCHENKER INTERNATIONAL INC., a business entity or corporation; and GREATER BAY TRANSPORTATION INC.,

Defendant(s).

_____/

No. c-99-2989 MHP

ORDER RE JURISDICTION

(Filed Aug. 17, 2000)

This action was brought in state court based in part on a claim under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 ("Warsaw Convention"). The action was removed to this court pursuant to 28 U.S.C. section 1331 based on the Warsaw Convention claim. Plaintiff did not move to remand and proceeded to respond to defendant Schenker's motion for summary judgment. Only in response to that motion did plaintiff concede that the Warsaw Convention did not apply. Plaintiff did not stop there, however, and seek remand, but proceeded to argue the merits of the summary judgment motion related to limitations of liability under federal common law and state law.

Plaintiff now files a "Suggestion that the Court Lacks Subject Matter Jurisdiction" contending that since the court found that the Warsaw Convention does not apply to the particular facts of this case, the court lacked jurisdiction to proceed on the other issues raised in defendant's motion. Thus, having now lost the motion, plaintiff asks the court to vacate its order granting summary adjudication and remand the action to state court.

"It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed. . . . When a subsequent narrowing of the issues excludes all federal claims, whether a pendant [sic] state claim should be remanded to state court is a question of judicial discretion, not of subject matter jurisdiction." *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754, 758 (6th Cir. 2000) (quoting *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981)). It is also fundamental that removal jurisdiction is determined from the face of the complaint and the removing documents. Each of those documents in this case posited claims based on the Warsaw Convention. Furthermore the facts alleged in the complaint, which included claims against Eva Airways and others responsible for cargo shipped from San Francisco to Singapore, implicated the Warsaw Convention. Nor was there any argument that under the well-pleaded complaint rule there was artful pleading so as to bring the claims within the jurisdiction of this court. The well-pleaded complaint claimed that goods were lost and that one or more of the defendants was liable. The facts alleged would appear to bring one

or more of them under the Warsaw Convention. It was only after discovery that the location of the loss became apparent and that the claim was not within the purview of the Convention. It was not until defendant filed its motion that plaintiff conceded the Warsaw Convention did not apply and the court, after reviewing the papers agreed.

At the time the court issued its summary judgment adjudication, no motion for remand was made. Since jurisdiction attached at the time of the removal and the court had jurisdiction at that time, it is now within the court's discretion to determine whether to remand the action or retain jurisdiction. The court chooses the latter and will retain jurisdiction of this action until it is resolved. The suggestion to remand is denied.

IT IS SO ORDERED.

Date: August 17, 2000

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

awb

United States District Court
for the
Northern District of California
August 21, 2000

CERTIFICATE OF SERVICE

Case Number: 3:99-cv-02989

Albingia
vs
Eva Airways Corp.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 21, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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A Bowser, Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALBINGIA VERSICHERUNGS A.G. and SIEMENS COMPONENTS PTE. LTD., Plaintiffs, vs. EVA AIRWAYS CORPORATION, SCHENKER INTERNATIONAL, INC., and GREATER BAY TRANSPORTATION, and DOES ONE THROUGH ONE HUNDRED, Defendants.	No. C-99-2989-MHP **MEMORANDUM AND ORDER** (Filed Jul. 5, 2000)

On May 3, 1999 Albingia Versicherungs A.G. ("Albingia") and Siemens Components Pte. Ltd. ("Siemens") (collectively "plaintiffs") filed this action in California State Court against EVA Airways Corporation ("EVA"), Schenker International, Inc. ("Schenker"), and Greater Bay Transportation seeking $235,005.00 in damages for loss of cargo under the Warsaw Convention, negligence, breach of contract, breach of duty to care for property in bailment, and conversion. The lost cargo consisted of computer circuits missing from boxes shipped by EVA, Schenker and Greater Bay Transportation. The action was removed to federal court under 28 U.S.C. § 1441(b), the court having jurisdiction pursuant to 28 U.S.C. § 1331. Remaining in the action is the claim against Schenker ("defendant"). Now before the court is defendant's motion for summary adjudication. The question is whether defendant's liability, if any, is limited to the

amount specified by the Warsaw Convention or, alternatively, by contract as set forth in the air waybills. Having considered the parties' arguments, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

Siemens is a major manufacturer of computer components and circuits. It maintains manufacturing facilities in Singapore, among other places. Some of the products Siemens manufactures in the Far East are shipped to the United States for testing and then shipped back to the Far East.

This case involves a shipment of computer circuits that were manufactured in Singapore and shipped to San Jose to be tested by an independent contractor, Mosel Vitelic. After Mosel Vitelic completed the testing, Siemens instructed Schenker, an international freight forwarder, to arrange for the shipment back to the Far East. The shipment was stored in Schenker's warehouse facility in South San Francisco for approximately four days and then delivered to EVA Airways Corporation ("EVA") on March 1, 1997. EVA carried the shipment by air and delivered it to Schenker's facilities in Singapore on March 4, 1997.

Schenker issued two air waybills relating to the shipment: a "House air waybill" and a "Master air waybill." The House air waybill was issued by and on behalf of Schenker, while the Master air waybill was issued by Schenker on behalf of EVA. Both air waybills contained limitation of liability clauses. Printed on the front upper right side of each air waybill was the following:

> It is agreed that the goods described herein are accepted in apparent good order and condition (except as noted) for carriage SUBJECT TO THE CONDITIONS OF CONTRACT ON THE REVERSE HEREOF . . . THE SHIPPER'S ATTENTION IS DRAWN TO THE NOTICE CONCERNING CARRIER'S LIMITATION OF LIABILITY. Shipper may increase such limitation of liability by declaring a higher value for carriage and paying a supplemental charge if required. (Emphasis in the original.)

Printed on the reverse of the air waybills at the top center was the following:

> NOTICE CONCERNING CARRIER'S LIMITATION OF LIABILITY
>
> If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the convention governs and in most cases limits the liability of the carrier in respect of loss, damage or delay to cargo to 250 French gold francs per kilogram, unless a higher value is declared in advance by the shipper and a supplementary charge paid if required.
>
> The liability limit of 250 French gold francs per kilogram is approximately USD 20.00 per kilogram on the basis of USD 42.22 per ounce of gold. (Emphasis in the original.)

Printed below this language were the following terms and conditions:

> **CONDITIONS OF CONTRACT**
>
> 2.2.1 Carriage hereunder is subject to the rules relating to liability established by the Warsaw

Convention unless such carriage is not "international carriage" as defined by that Convention.

* * *

4. Except as otherwise provided in carrier's tariffs or conditions or carriage, in carriage to which the Warsaw Convention does not apply carriers' liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged, or delayed, unless a higher value is declared by the shipper and a supplementary charge paid.

* * *

6. In cases of loss damage or delay of part of the consignment, the weight to be taken into account in determining carrier's limit of liability shall be only the weight of the package or packages concerned.

* * *

7. Any exclusion or limitations of liability applicable to carrier shall apply to and be for the benefit of carrier's agents, servants and representatives and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives. For purposes of this provision carrier acts herein as agent for all such persons.

Schenker in Singapore received the shipment from EVA Airways on March 4, 1997. An examination of the thirty-five cartons[1] revealed that one of the three inner boxes in each carton contained a brick instead of circuits. Schenker in Singapore notified Schenker in South San Francisco of the missing circuits. Schenker's South San Francisco Branch Manager, Joachim Kueppers, and South San Francisco Warehouse Manager, Jim Mollison, then reviewed a videotape from a closed-circuit camera in the warehouse to determine whether or not Schenker had

weighed the shipment upon receipt. After Kueppers and Mollison reviewed it, that videotape, along with all other videotapes made during the four days the shipment was in Schenker's warehouse, disappeared. Testifying as Schenker's designated representative under Federal Rule of Civil Procedure 30(b)(6), Kueppers stated that Schenker cannot explain why or how the videotapes disappeared.

More than one week before Schenker received the Siemens shipment, Schenker's President and C.E.O., P. Robert Dörnte, criticized the level of cleanliness in the warehouse and its effect on Schenker's ability to attract and retain "high tech" business, such as Siemens. As a result of that criticism, Kueppers prepared an action memorandum on February 17, 1997. That memorandum ordered replacement of the locks on all exterior doors, installation of an electronic lock on the door from the warehouse to the office, and tighter control of keys to the new locks, to be distributed to a more restricted set of employees. The target date for completion of this corrective action was February 28, 1997. The directive was completed on or about May 7, 1997.

Neither Mollison nor Kueppers is still employed by Schenker.

LEGAL STANDARD

The court may grant summary adjudication of a particular claim or defense under the same standards used to consider a summary judgment motion. *See* Fed. R. Civ. P. 56(a), (b); *Pacific Fruit Express Co. v. Akron, Canton & Youngstown Railroad Co.*, 524 F.2d 1025, 1029-30 (9th Cir. 1975). Summary judgment shall be granted when there is no genuine issue of material fact and the movant

is entitled to judgment as a matter of law. *See* Fed. R. Civ. 56(c).

The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by [its] own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (citations omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The moving party discharges its burden by showing that the nonmoving party has not disclosed the existence of any "significant probative evidence tending to support the complaint." *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 290 (1968). The court does not make credibility determinations in considering a motion for summary judgment. *See Anderson*, 477 U.S. at 249. Rather, it views the inferences drawn from the facts in the light most favorable to the party opposing the motion. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractor's Ass'n,* 809 F.2d 626, 631 (9th Cir. 1987).

DISCUSSION

I. Applicability of Warsaw Convention

Both parties agree that the threshold question in this case is whether the Warsaw Convention and its limitation of liability are applicable to the lost cargo. The Warsaw Convention, the text of which appears in a note following

49 U.S.C.A. §40105, is an international treaty that applies to international transportation of goods. Its limitation on liability pertains to goods lost or damaged in an airport or on board an aircraft, but not to goods damaged outside of an airport.

When the location of the loss or damage is unknown, Article 18(3) of the Warsaw Convention creates a rebuttable presumption that, where there is a contract for transportation by air, the damage to or loss of the cargo has occurred during the transportation by air.[2] It is unknown where the computer circuits in question were lost, and the videotapes from the closed circuit camera in the Schenker warehouse for the four days during which the shipment was there have disappeared.[3] Plaintiffs argue that the disappearance of the videotapes entitles them to a presumption that Schenker's managers, specifically Kueppers and Mollison, were involved in the theft of the cargo.[4]

Considering the missing evidence, and viewing the matter in the light most favorable to the nonmovants, the court must presume that the loss occurred while the cargo was stored in Schenker's South San Francisco warehouse. Consequently, the Warsaw Convention does not apply and Schenker concedes this. A trier of fact may draw an adverse inference from the destruction of evidence known to be relevant. *See Akiona v. United States,* 938 F.2d 158, 161 (9th Cir. 1991). Where the loss or destruction of evidence was unintentional, there may be no such presumption. *See INA Aviation Corp. v. United States,* 468 F. Supp. 695, 700 (E.D.N.Y. 1979). Although plaintiffs have presented no evidence that the videotapes were intentionally destroyed or misplaced, destroying relevant evidence in *knowing disregard of the plaintiff's claim* creates a

presumption that the evidence was destroyed intentionally. *See Nation-wide Check Corp., Inc. v. Forest Hills Distrib. Inc.,* 692 F.2d 214, 217 (1st Cir. 1982). Schenker knew of the relevance of the videotapes to plaintiffs' claims and was in possession of the tapes when it gained this knowledge.

In view of the fact that the Warsaw Convention does not apply, the court must determine what law governs. On this the parties do not agree.

II. When the Warsaw Convention Does Not Apply

Defendant claims that federal common law applies where the Warsaw Convention is inapplicable, whereas plaintiffs claim that state common law applies under these circumstances. Both parties maintain that there is a split of authority in the Ninth Circuit on this issue. While the cases they deem contradictory are not easily reconciled, they do not conflict in the way the parties claim. *Compare Ins. Co. of North America v. Federal Express Corp.,* 189 F.3d 914 (9th Cir. 1999) *with Read-Rite Corp. v. Burlington Air Express. Ltd.,* 186 F.3d 1190 (9th Cir. 1999).

The parties claim that *Read-Rite* stands for the rule that federal common law applies when the Warsaw Convention is inapplicable. The *Read Rite* court did use federal common law to determine the validity of the clause, but to interpret the content of the clause, the court used state common law. *See Read-Rite*, 186 F.3d at 1195, 1197. Federal common law was applied to carriers while they were regulated by the federal government, and deregulation of air carriers did not change the applicability or substantive content of the relevant federal common law. *See id.* at 1195 (citing *Deiro v. American Airlines,*

Inc., 816 F.2d 1360 (9th Cir. 1987)). The Airline Deregulation Act ("ADA") of 1978 provides that states may not "enact or enforce a law, regulation, or other provision having the force and effect of law relating to a price, route, or service of an air carrier. . . . " 49 U.S.C. §41713(b) (1). In cases dealing with common carriers, state law is only applied to "the parties' bargain, with no enlargement based on state laws or policies external to the agreement." *Read-Rite*, 186 F.3d at 1197 (citing *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 232-33 (1995)). The construction of air waybills and the validity of limited liability provisions within them involve substantive law relating directly to the carrier's rates and services and are matters of "policies external to the agreement." Therefore, federal common law governs these issues. *See id.* at 1197-98. However, state law governs contract content, which is a matter of the parties' bargain. *See id.* at 1197.

The parties claim that *Federal Express* stands for the rule that state common law applies when the Warsaw Convention is inapplicable. Yet the Warsaw Convention did in fact apply in *Federal Express,* and the court used state law to interpret its language. The *Federal Express* court read Article 25 of the Warsaw Convention, which deprives a carrier of limited liability for damage caused by its wilful misconduct, as a "pass-through" provision, authorizing the court to apply the law that would govern in absence of the Warsaw Convention. *See Federal Express,* 189 F.3d at 920 (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229 (1996)). The Ninth Circuit then followed the Second Circuit in holding that, in the absence of a federal statute, the applicable law for the purposes of Article 25 of the Warsaw Convention is the law of the state in which the district court sits. *See id.* at

920 (citing *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996.))

In his concurring opinion, Judge Fletcher criticizes the *Federal Express* majority for ignoring *Read-Rite* in its analysis. *See id.* at 923 (Fletcher, J., concurring). Nevertheless, *Read-Rite* is still the controlling Ninth Circuit case determining the appropriate choice of law when the Warsaw Convention is inapplicable. The *Federal Express* court only ruled on the appropriate choice of law for the purposes of the pass-through provisions of the Warsaw Convention, an issue not confronting this court. Accordingly, the court will follow *Read-Rite* in applying federal common law to determine the enforceability of the air waybill's liability limitation clause and state common law to interpret its content.[5]

A. Validity of the Contract Provision Limiting Liability

Relying on the presumption that Schenker employees stole the goods, plaintiffs argue that the contractual provision limiting defendant's liability for the theft committed by its employees is against public policy and thus invalid. In support of this assertion, plaintiffs cite California Civil Code sections 1668 and 2175. This argument fails for two reasons. First, they misstate the content of sections 1668 and 2175. Both sections prohibit contract provisions that attempt to exempt a party from liability for its own wilful misconduct; neither prohibit contract provisions that merely limit liability.[6] Second, even if plaintiffs had correctly recited state law, federal common law preempts state law in determining the validity of a clause in an air waybill. *See Read-Rite*, 186 F.3d at 1197.

Under federal common law, Schenker's liability limitation clause is prima facie valid. While federal common law holds provisions that attempt to completely *exculpate* a carrier from liability invalid as against public policy, *see id* at 1196 citing *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1314 (9th Cir. 1977), a *limited* liability provision is valid if the contract offers the shipper reasonable notice of the limited liability and a fair opportunity to purchase greater coverage. *See id.* at 1198. Limited liability provisions are prima facie valid if the face of the air waybill recounts the liability limitation and the way to avoid it. *See id.* at 1198 (citation omitted). Language on the front of both the Master air waybill and the House air waybill specifically refers to the carrier's limitation of liability and the way to avoid it. Furthermore, as defendant correctly argues, the court must assume the shipper had notice of the liability limitation if the shipper purchased separate insurance. *See id.* at 1198. Indeed, Siemens' insurance company, Albingia, is also a plaintiff in this action, thus indicating that Siemens purchased separate insurance.

The presumed employee theft of the computer circuits does not invalidate the liability limitation provision. According to federal common law, the theft of cargo by an employee of a common carrier will invalidate a contractual limitation of liability only if the theft was for the carrier's own use or gain. *See Glickfeld v. Howard Van Lines,* 213 F.2d 723, 727 (9th Cir. 1954). The plaintiffs do not argue, nor do they offer any evidence to support the contention that the presumed theft was for the carrier's own use or gain, as opposed to the use or gain of the individual thieves.[7]

B. Interpretation of the Contract Provision Limiting Liability

Plaintiffs argue that the language "goods lost, damaged or delayed" does not include goods stolen and consequently, the liability limitation is inapplicable. State law applies to the content of the contractual clause, as it is a matter of the parties' bargain. *See Read-Rite*, 186 F.3d at 1197.

Courts interpret contracts to give effect to the mutual intention of the parties. *See Morey v. Vannucci,* 64 Cal. App. 4th 904, 912 (1998) (citations omitted). Where the parties dispute the meaning of contract terms, the court will look to extrinsic evidence to determine whether the contract is reasonably susceptible to a particular meaning; if the term is reasonably susceptible to the particular meaning, the interpretation is a question for the jury. *See id.* at 912 (citations omitted).

The plain meaning of "loss" includes loss by theft, and to show otherwise. The court concludes as a matter of law that loss by theft is included in the contract language "lost, damaged, or delayed" and is covered by the liability limitation provision.

C. Plaintiffs' Bailee Argument

Plaintiffs argue that defendant violated its duty of care as a bailee. If this is a valid issue, it goes to whether defendant is liable and is irrelevant to the analysis of the limitation of liability provision.

CONCLUSION

For the reasons set forth above, the court hereby GRANTS defendant's motion for summary adjudication, finding that the Warsaw Convention does not apply and that the defendant's liability under the contract provision is limited as set forth in the air waybills.

The parties shall contact the court to set dates for further proceedings.

IT IS SO ORDERED.

Dated: July 6, 2000

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California
Date:

ENDNOTES

1. The parties' joint statement of undisputed facts indicates that there are thirty-eight cartons, but defendant's version of the facts and the copy of the actual air waybill indicate that there were thirty-five cartons.

2. Neither party has raised this presumption in their analyses.

3. Plaintiffs raise these facts when arguing that wilful misconduct on the part of defendant precludes defendant from limiting its liability. However, it is appropriate to discuss them here in deciding if there is sufficient evidence to override the Warsaw Convention's presumption that loss occurred during air transport.

4. Plaintiffs rely on Federal Rule of Evidence 301 for this presumption. Federal Rule of Evidence 301 does not relate to destroyed or missing evidence, but rather to how burdens

shift once there is a presumption in favor of one side or another. Therefore, Federal Rule of Evidence is irrelevant in the analysis of whether or not a presumption of wrongdoing is warranted.

5. This court acknowledges that *Read-Rite* and *Federal Express* leave curious results. In *Federal Express* the air carrier was covered by the Warsaw Convention and the Convention's pass-through provision was treated, under *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), as calling for the application of state law. Yet, under *Read-Rite*, where the Convention did not apply to the air carrier's liability because the loss did not occur during actual air transportation, the Airline Deregulation Act ("ADA") was found to preempt state law and federal common law was applied. Thus, the conduct more remote from air transport, as in *Read-Rite*, is controlled by the ADA and federal law, while the conduct occurring as part of the traditional air carrier function ultimately may be controlled by state law. It does appear that in this case the result would be the same under either of these Ninth Circuit precedents.

6. Plaintiffs also cite *Blankenheim v. E.F. Hutton & Company, Inc.,* 217 Cal. App. 3d 1463 (1990). This case is inapplicable because the clause in question is a "hold harmless" clause, not a liability limitation clause, and because the defendant is a securities firm, not an air cargo carrier.

7. Plaintiffs also argue foreseeability of the theft as a basis for Schenker's liability and to distinguish the case from *Federal Express*, which deals with the Warsaw Convention's wilful misconduct exception to the liability limitation. This foreseeability argument is irrelevant to this analysis. First, the issue here is not Schenker's liability, but rather the validity of the liability limitation clause. Second, the Warsaw Convention is presumed not to apply here so the wilful misconduct exception is not at issue.